Supreme Court, U.S.
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Case No OFFICE OF THE CLERK

Supreme Court of the United States

PAUL H. KRALMAN,
Plaintiff-Appellant,
v. 93-3398
ILLINOIS DEPARTMENT OF VETERANS' AFFAIRS,
Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

OCTOBER, 1994, TERM

Fred W. Johnson,
Attorney for Plaintiff
SUTTERFIELD & JOHNSON, P.C.
208 South Second
P.O. Box 836
Effingham, IL 62401
(217) 342-3100

40 pp

I.

Is it proper for a Federal Appeals Court under Rule 56 F.R.C.P. to resolve as a matter of law the credibility of an employer's proffered reason for denying an elderly worker employment under the ADEA at a time when the employer is unable to articulate a rational basis for its decision.

What objective criterion are the Federal Courts of Appeal to apply in determining whether or not to grant summary judgment under the ADEA when the issue before the Court is whether the employer's proffered reasons for failing to hire an elderly worker within the protected class is a pretext for age discrimination or merely "bad business judgment."

II.
LIST OF ALL PARTIES TO THE PROCEEDING

Plaintiff: Paul Kralman
Defendant: Illinois Department of Veterans' Affairs

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STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA IS INVOKED

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered April 20, 1994, and the Motion to Reconsider was denied by the Seventh Circuit on June 3, 1994.

Jurisdiction is conferred on this Court pursuant to 28 U.S.C., Section 1254, which provides for review by writ of certiorari upon petition of any party to a civil or criminal case before or after rendition of a judgment or decree.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS INVOLVED

29 U.S.C. Section 623

Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) Employment agency practices. It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices. It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or

tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment,because of such individual's age;
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member of applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc. It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices: age an occupational qualification; other reasonable factors; seniority system employee benefit plans; discharge or discipline

for good cause. It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a work place in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such work place is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purpose of this Act et seq.], except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act [29 US(Section 631(a)] because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) [Deleted]

(h) Foreign practices. (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determi-

nation of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees. (1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years or participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commences as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of inservice distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commences as of the end of such year in accordance with section 206(a)(3) of the Employee Retirement Income Security Act of 1974 [29 USCS Section 1056(a)(3)] and section 401(a)(14)(C) of the Internal Revenue Code of 1986 [26 USCS Section 401(a)(14)(C)], and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 [29 USCS Section 1053(a)(3)(B)] or section 411(a)(3)(B)] of the Internal Revenue Code of 1986 [26 USCS Section 411(a)(3)(B)], then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such

employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of the Internal Revenue Code of 1986 [26 USCS Section 414(q)]) to the extent provided in regulations prescribed by the Secretary of the Treasury for employees within the meaning of subchapter D of chapter 1 of the Internal Revenue Code of 1986 [26 USCS Sections 401 et. seq.].

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(h) of the Internal Revenue Code of 1986 [26 USCS Section 411(b)(1)(H)(v)] and subparagraphs (C) and (D) of section 411(b)(2) of such Code [26 USCS Section 411(b)(2)(C), (D)] shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(B)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 3(24)(B) of the Employee Retirement Income Security Act of 1974 [29 USCS Section 1002(24)(B)] and section 411(a)(8)(B) of the Internal Revenue Code of 1986 [26 USCS Section 411(a)(8)(B)].

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan",

"defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(B) The term "compensation" has the meaning provided by section 414(s) of the Internal Revenue Code of 1986 [26 USCS Section 414(s)].

[(j)](i) Employment as firefighter or law enforcement officer. It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on march 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

STATEMENT OF THE CASE

Paul Kralman had been employed as a Veterans' Service Officer ("VSO") in the Department's office in Vandalia, Illinois from May, 1979, until the office was closed in August, 1987, due to a lack of funding. He was given the option of drawing a pension or retaining his right of recall should the office reopen sometime in the future. Kralman chose to draw a pension.

In March, 1989, the Department made plans to reopen the office. Upon receiving word of the Department's intentions, Kralman requested reinstatement as the VSO for the Vandalia office. Although the Department had the right to reinstate Kralman to his prior position if it wished, the Department decided instead to open the application process to other candidates approved by Central Management Services. Kralman and three other applicants were interviewed for the position. The Department ultimately hired one of the other candidates, Lynn P. Brown.

Kralman, who was 71 at the time that he applied for reinstatement to his former position, was denied the position in favor of a 46-year old whose previous experience consisted of working at a tavern at the American Legion tending bar. Mr. Kralman's prior work record was unblem-

ished and he was rated "exceeds expectations" by his supervisors during the seven years he previously worked as a Veterans' Service Officer. Mr. Kralman, on repeated occasions, was denied reinstatement for many months before the position was filled, despite the fact there was a mandate to fill the position.

The Plaintiff was initially reinterviewed for the VSO position by Howard Wilson, who, in turn, recommended that 46-year-old Lynn Brown be chosen to fill the VSO position. Mr. Brown advanced three reasons to support his decision not to hire Paul Kralman. These reasons were:

1) Brown's alleged superior education;

2) Mr. Kralman's demeanor during the interview; and

3) Mr. Brown's disabled veteran's status.

Mr. Wilson, in his deposition, could not articulate a factual basis to support his claim that Mr. Brown's formal educational background in any way better qualified him for the VSO position than Mr. Wilson with eight years prior experience. Nor was Mr. Wilson able to advance a factual basis to support his conclusion that Mr. Kralman's demeanor was in any way less than desirable or proper. Thirdly, Mr. Wilson, in his deposition, offered absolutely no factual basis that it was proper for him to rely on a dis-

abled veterans' status to choose Mr. Brown over Mr. Kralman. Indeed, as a matter of Illinois law, the disabled veterans' status, as conceded by the Director of the Department of Veterans' Affairs, was not to be applied past the initial screening level of the Central Management Service, which had already cleared Mr. Brown and Mr. Kralman for consideration by the Department. The Plaintiff further introduced unchallenged expert testimony of Mike Ippolito, who had decades of experience in state government and concluded that the failure to reinstate Mr. Kralman was predicated on age discrimination. The Defendant, at the trial level, characterized Mike Ippolito as "experienced in personnel matters." The Federal Appellate court ignored this unchallenged expert testimony in its decision.

The original jurisdiction of this case was pursuant to 29 U.S.C., Section 621, which confers federal jurisdiction for a cause of action under the ADEA.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

Certiorari is necessary and appropriate in this case because of a disturbing trend among the federal courts of appeal to grant summary judgment in cases arising under the ADEA wherein the issue is whether a plaintiff has established sufficient facts of record to legitimately challenge an employer's stated reasons for denying an elderly individual employment because of his age or whether the plaintiff's challenge of the employer's stated reasons shows nothing more than a "honest mistake" or "bad business judgment."

As noted in the opinion of the Appellate Court, a plaintiff within the protected class (i.e., over 40 years of age) may prove age discrimination by either presenting direct evidence of discrimination or utilizing the indirect burden-shifting method of proof first recognized in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973). Since most age discrimination cases lack direct evidence of age bias, most plaintiffs rely upon the indirect burden-shifting method of proof. Under the indirect method of proof, once the Plaintiff shows he was in the protected class and replaced by a younger individual, the burden shifted to the defendant

employer to show a legitimate non-discriminatory reason for giving the younger person preference over the older plaintiff. Once the employer offers a legitimate non-discriminatory reason, the burden shifts back to the plaintiff to attack the reasons proffered by the defendant as being a pretext for age discrimination by showing the proffered reasons lacked a rational basis in fact or were unworthy of credence.

The Federal Courts of Appeal have recently shown a disturbing trend to resolve age discrimination cases by way of summary judgment by holding as a matter of law that an employer made a "bad business judgment" rather than allowing a jury to decide whether the employer's proffered reasons were a pretext for age discrimination. Apart from the instant case, some of the Federal Appellate decisions which resolve these issues as a matter of law include *McCoy v. WGN Continental Broadcasting Company* 957 Fed.2d. 368, 373 (7th Cir., 1992), and *Bienkowski v. American Airlines* 851 Fed.2d. 1503 (5th Cir., 1988). The Court in *Aungst v. Westinghouse Electric Corporation* 937 Fed.2d. 1216 (7th Cir., 1991) went so far as to state that an employer must be given the benefit of the doubt regarding an explanation of its employment decisions. In *Perfetti vs.*

First National Bank of Chicago 950 F.2d. 449 (7th Cir., 1991), the Appeals Court squarely stated:

> "Can we revise a jury verdict based solely on a lack of credence without infringing on the jury's exclusive right to judge credibility? The answer is 'we can.'"

In the case at bar, the Appellate Court conceded, "it is important to keep in mind, however, that there is a fine line between evidence that appropriately challenges the employer's proffered reasons as being unworthy of credence and evidence that merely shows the employer made a mistake or bad business judgment." The Court then went on to state that the ADA could not protect older employees from even "arbitrary personnel decisions" but only from those which are unlawfully motivated. If a decision is arbitrary and without basis in fact, this would directly give rise to an inference of a possible age discrimination case which would be ultimately up to a jury to decide, not an appellate court, as a matter of law.

Guidance is needed from the Supreme Court to delineate when judges are permitted to resolve issues of credibility as a matter of law in age discrimination and when such issues are appropriately left to the jury, particularly in cases wherein the courts concede that several of the employer's proffered reasons for refusing to hire an elderly

employee do not have a basis in fact.

Most cases arising under the ADEA will involve the indirect method of proof first established in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d. 668 (1973). Under this burden-shifting method of proof, the Plaintiff must first establish that he was within the protected age group by being over 40 years of age, performed his job satisfactorily and, thirdly, suffered a materially adverse employment action. The burden of proof then shifted to the Defendant to establish a legitimate non-discriminatory reason for not selecting the Plaintiff. Once this is done, the burden shifts back to the Plaintiff to show that the articulated reasons of the Defendant are a mere pretext for age discrimination. Most cases will be resolved at the last stage of the burden-shifting analysis, i.e., whether the articulated reasons of the Defendant are a pretext for age discrimination or not. In Mr. Kralman's case, the Appellate court determined that a prima facie case was established under the burden-shifting analysis first established in *McDonnell Douglas Corporation v. Green, supra.* The Court, however, committed egregious error by ignoring the following factual matters which undermined the legitimacy of the employer's articulated

reasons for not hiring Paul Kralman:

a) Seventy-one-year-old Paul Kralman had eight years of experience as a VSO. His replacement, 47-year old Brown, had none;
b) Paul Kralman was rated as "exceeds expectations" in his last seven years of prior employment as a VSO;
c) The VSO position for which Mr. Kralman sought reinstatement was vacant at the time of his request for reinstatement, the reinstatement request was made at a time when the Defendant was under a mandate to fill vacant VSO positions, and the reinstatement request was made at a time when there were no other candidates to the VSO position known to the Defendant. This scenario was described by Defendant's Deputy Director, David Knox, as "ineptness" on the part of Defendant and it raises a factual issue as to credibility and motive of Defendant;
d) Mr. Wilson, who declined to recommend reinstatement of Paul Kralman during the time the vacancy existed, was the very decision-maker who recommended against Mr. Kralman becoming a VSO once competitive bidding was opened for the position;
e) The Appellate Court tacitly conceded that two of the three reasons advanced by the decision-maker, Howard Wilson, did not have a rational basis, i.e., Wilson could not articulate how Mr. Kralman's demeanor was unsatisfactory, nor could Mr. Wilson articulate how a superior formal education on the part of Mr. Brown better enabled him to perform the job of a VSO;
f) The Appellate Court, in this case, predicated its case on a *factual* determination that Mr. Wilson's third reason for not selecting Mr. Kralman, i.e., Mr. Brown was a disabled veteran, was a

belief honestly held by Mr. Wilson. The record demonstrates that Mr. Wilson could not articulate any facts supporting his belief. The record shows that even the head of the Department of Veterans' Affairs, John Johnston, conceded that it was not appropriate for Mr. Wilson to rely on a disabled veteran's status in deciding whether or not Mr. Brown should be given the position. The Appellate Court stated that, had Johnson been the decision maker, its decision would have been different. Despite the Appellate Court's concession in this regard, the Appellate Court omitted from its consideration that both David Knox and Jack Johnston, the Director of Defendant, each individually discussed with Wilson his selection of Brown for the VSO position. Both concurred in his selection of Brown as the most qualified candidate and *both* agreed that Brown's status as a disabled veteran was not an appropriate determinative criteria. Therefore, there are only two possible conclusions that can be derived of this scenario: 1) Brown's disabled veteran's status was not a determinative criteria for Wilson for the reason that, had he mentioned it to either Knox or Johnston, they would have clearly indicated that it was not a basis for determining qualified candidates; or 2) Knox and Johnston allowed Wilson to make the decision to hire Brown, notwithstanding the knowledge that Wilson had deviated from known standards. This was a serious error of law by the Appellate Court inasmuch as it conceded that the result would have been different had Johnston been the decision-maker *and* there is direct evidence contradicting Wilson's credibility as to whether or not Brown's status as a disabled veteran was a determinative factor in Wilson's decision;

g) The Appellate Court has usurped the function of

the jury by deciding a disputed factual matter as an issue of law;

h) The Appellate Court completely ignored undisputed expert testimony of Mike Ippolito that the decision not to hire Paul Kralman was predicated upon age discrimination. The Defendant, at the trial level, did not dispute Ippolito's qualifications and, in fact, characterized Mr. Ippolito as "experienced in personnel matters;"

i) Mr. Wilson's credibility was further undermined by his statement that he did not participate in the decision to reinstate Mr. Kralman. Mr. Knox, a superior to Mr. Wilson, testified that he believed Wilson was involved in the earlier decision not to reinstate Paul Kralman;

j) The Appellate Court failed to take into account Wilson's own testimony that he considered "future needs" of the Department to mean a long time. The reference to future needs was a statement made by the Department in response to a charge of age discrimination. Mr. Wilson's interpretation of "future needs" of the Department gives rise to an age base motivation on his part in failing to hire Paul Kralman.

Unless guidance is given by the Supreme Court, Federal Appeals Courts will continue to resolve factual matters as issues of law and victims of age discrimination will be denied the opportunity of a hearing before a jury of their peers.

APPENDIX

Parts of Record *Pages of Appendix*

1. United States District Court Judgment 26
2. United States Court of Appeals Decision on Appeal 27-39
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CONCLUSION

WHEREFORE, your petitioner respectfully prays this Court grant certiorari in this case.

PAUL KRALMAN

By: *(signature)*
FRED W. JOHNSON,
Attorney for Plaintiff

Fred W. Johnson
Attorney at Law
SUTTERFIELD & JOHNSON, P.C.
208 South Second
P.O. Box 836
Effingham, IL 62401
(217) 342-3100

United States District Court

Central District of Illinois

PAUL H. KRALMAN

v. 91-3194

ILLINOIS DEPARTMENT OF VETERANS' AFFAIRS

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED by the Honorable Richard Mills that the Defendant's motion for summary judgment (d/e 53) is ALLOWED. The parties are to bear their own costs.

September 17, 1993

JOHN M. WATERS
Clerk
BONNIE NICHOLS
Deputy Clerk

In the

United States Court of Appeals

For the Seventh Circuit

PAUL H. KRALMAN,
Plaintiff-Appellant,

v. 93-3398

ILLINOIS DEPARTMENT OF VETERANS' AFFAIRS,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 91 C 3194—**Richard Mills,** Judge.

ARGUED FEBRUARY 15, 1994—DECIDED APRIL 20, 1994

Before WOOD, JR., and KANNE, *Circuit Judges,* and FOREMAN, *District Judge.**

FOREMAN, *District Judge.* Paul Kralman is appealing from the district court's entry of summary judgment in favor of the Illinois Department of Veterans' Affairs on Kralman's age discrimination claim. We affirm.

* The Honorable James L. Foreman, District Judge for the Southern District of Illinois, sitting by designation.

I. FACTS

Paul Kralman had been employed as a Veterans' Service Officer in the Department's office in Vandalia, Illinois, from May 1979 until the office was closed in August 1987 due to a lack of funding. He was given the option of drawing a pension or retaining his right of recall should the office reopen sometime in the future. Kralman chose to draw a pension.

In March 1989, the Department made plans to reopen the office. Although the Department had the right to reinstate Kralman to his prior position if it wished, the Department decided instead to open the application process to other candidates approved by Central Management Services. Kralman and three other applicants were interviewed for the position. The Department ultimately hired one of the other candidates, Lynn P. Brown.

Kralman, who was 71 at the time that he applied for reinstatement to the position, claims that he was denied the position because of his age. The Department denies that age was a factor in the decision. It asserts that Brown, who was 46 at the time, was chosen because of his superior educational background, his demeanor during the job interview, and the fact that he is a veteran with a service-connected disability.

Kralman brought suit against the Department under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. The district court granted the Department's motion for summary judgment against Kralman on two grounds. The court first stated that Kralman could not establish a *prima facie* case of discrimination because the Department ultimately hired a person who also was in the age class protected under the ADEA. The court based this ruling on recent Seventh Circuit decisions which, in the court's opinion, appeared to create "a uniform requirement that persons not in the protected class must be treated more favorably in order for the plaintiff" to establish a *prima facie* case of discrimination. Dist. Ct. Order, at 5.

In the alternative, the court held that even assuming

the plaintiff could establish a *prima facie* case, the plaintiff could not prove that the Department's reasons for hiring Brown were a pretext for discrimination. The plaintiff appeals from that decision.

II. ANALYSIS

The appellate court reviews summary judgments under a de novo standard. *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 370 (7th Cir. 1992).

> In order to uphold a grant of summary judgment, we must "view the record and all inferences draw from it in the light most favorable to the party opposing the motion" . . . and conclude there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . . Summary judgment is only appropriate when the record reveals that no reasonable jury could find for the non-moving party.

Id. (citations omitted). This standard "is applied with added rigor in employment discrimination cases, where intent is inevitably the central issue." *Id.* at 370-71.

Under the ADEA, an employer may not discharge, refuse to hire, or otherwise discriminate against any individual who is age 40 or older. 29 U.S.C. §§ 623(a), 631(a). "The plaintiff need not prove that age was the sole factor motivating the employer's decision, only that age was a determining factor in the sense that [the employment decision would not have been made] but for the employer's motive to discriminate on the basis of age." *Oxman v. WLS-TV*, 846 F.2d 448, 452 (7th Cir. 1988).

A plaintiff may prove age discrimination by either of two methods: (1) by presenting direct or circumstantial evidence that age was the determining factor in the employment decision; or (2) by utilizing the indirect, burden-shifting method of proof that was recognized in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) for Title VII cases.

Under this latter method, the plaintiff must establish a

prima facie case of discrimination by proving, *inter alia*,[1] that he or she was in the protected class and was otherwise qualified for the position. Satisfaction of these requirements for a *prima facie* case establishes a rebuttable presumption of discrimination and shifts the burden of production to the defendant to articulate lawful reasons for the employment decision. Once the defendant articulates a legitimate, nondiscriminatory reason for its actions, the presumption of discrimination dissolves and the burden shifts back to the plaintiff to prove that the defendant's proffered reasons are pretextual. *Oxman*, 846 F.2d at 452-53.

The appellant argues that the district court erred in holding that a plaintiff cannot establish a *prima facie* case under the ADEA if the defendant employer hires another individual who is also within the protected age class. He further argues that he presented sufficient evidence to create a genuine issue of material fact as to whether the Department's proffered reasons for not hiring the plaintiff were merely a pretext for age discrimination.

A. Establishing a Prima Facie Case

The precedents in this circuit set forth several some what confusing variations of the elements required to establish a *prima facie* case of age discrimination. Some adaptation is inevitable given the various types of employment action—i.e., hiring, demotions, discharges—that may be at issue in the case. However, we have found variations even within a particular class of action.[2]

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[1] The exact requirements of a *prima facie* case are in dispute in this appeal.

[2] For example, there are no fewer than four different statements of the prima facie requirements in cases involving discharges. See, e.g., *Darnell v. Target Stores*, No. 93-1061, slip op. at 6 (7th Cir. Feb. 7, 1994) (to establish a *prima facie* case under ADEA, plaintiff must prove he is (1) in the protected class; (2) performing the job satisfactorily; (3) nevertheless the subject of a materially adverse employment action; and (4) others outside of the protected class were treated more favorably); *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035,

(Footnote continued on following page)

In hiring cases, such as the case at bar, this circuit has issued at least two different versions of the *prima facie* requirements. In 1984, we stated that "a plaintiff must demonstrate (i) that he belongs to a protected group; (ii) that he applied and was qualified for a job for which the employer was seeking applications; (iii) that he was not hired; and (iv) that the employer continued to seek applicants." *Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 411 (7th Cir. 1984). In a case decided the following year, the wording of the first three elements in *Vaught* was changed only slightly, but the court substituted the following for the fourth element: "that the employer hired instead a younger person." *Caldwell v. National Ass'n of Home Builders*, 771 F.2d 1051, 1056 n.2 (7th Cir. 1985).

The district court acknowledged the *Caldwell* standard in its decision in the case at bar, but went on to adopt a third form of the test, stating:

> Most of the recent age discrimination cases reported by the Seventh Circuit involve terminations or demotions of employment rather than instances of failure to hire a job applicant. However, in examining the trend among age discrimination cases asserting some form of disparate treatment, it appears that the Seventh Circuit has created a uniform requirement that persons not in the protected class must be treated more favorably in order for a plaintiff to satisfy the fourth prong of the prima facie case. *Oxman v. WLS TV*, 846 F.2d 448, 455 (7th Cir. 1988); *Konowitz* [*v. Schnadig Corp.*, 965 F.2d 230, 232 (7th

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[2] *continued*
1039 (7th Cir. 1993) (plaintiff must prove (1) he was a member of the protected class; (2) he was performing his job well enough to meet employer's legitimate expectations; (3) he was discharged; and (4) the employer sought a replacement for him); *Monaco v. Fuddruckers, Inc.*, 1 F.3d 658, 660 (7th Cir. 1993) (plaintiff must prove (1) he was more than 40 years old, he performed his job satisfactorily; (3) he was discharged (either actually or constructively; and (4) the discharge occurred under circumstances which gave rise to an inference of age discrimination); *Grohs v. Gold Bond Bldg. Prods.*, 859 F.2d 1283, 1286 (7th Cir. 1988) (plaintiff must show that he (1) belongs to the protected class; (2) was qualified for his position; (3) was terminated; and (4) was replaced by a younger person.), *cert. denied*, 490 U.S. 1036 (1989).

> Cir. 1992)]; *Crady v. Liberty National Bank & Trust Co. of Indiana*, 993 F.2d 132, 134-35 (7th Cir. 1993). Therefore, this Court will follow the trend of the Seventh Circuit cases requiring that persons who are not members of the protected class must be treated more favorably in order for a plaintiff complaining of a materially ad verse employment action to establish a prima facie case of age discrimination.

Dist. Ct. Opinion, at 5.

The district court's reliance upon *Oxman, Konowitz,* and *Crady* is understandable, but not persuasive. It is important to keep in mind that none of those prior cases dealt with a situation where both the plaintiff and the person who received more favorable treatment were both in the protected class. Therefore, to the extent that these cases suggest that a plaintiff cannot prevail under those circumstances, that suggestion would be merely dictum. More significantly, a careful reading of Oxman shows that the court was merely suggesting one way in which a plain tiff could meet the *prima facie* case; it did not state that its variation of the fourth element is a sine qua non for recovery.[3]

A similar situation exists in *Konowitz* and *Crady.* In stating that a plaintiff must show that the employer "treated others outside the protected class more favorably than [the plaintiff] was treated," *Crady* cites to the *Konowitz* decision. *Konowitz,* however, states that a plaintiff "may"

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[3] *Oxman* presented a slightly more complex case because it involved an employee who was terminated under a reduction in force. Therefore, the court was required to adapt the usual *McDonnell Douglas* test for discharged employees. *Oxman* adopted the first three elements of a prima facie case—i.e., that the employee was in the protected class, that he was doing his job well, and that he was terminated. However, the court stated that the fourth element—that the employer sought a replacement—was not applicable to a reduction-in-force situation. Because the first three elements alone were not enough to establish a *McDonnell Douglas* inference, *Oxman* stated that "[t]here has to be something more—an additional showing that creates an inference of discrimination such as that created by an employer who fires an older employee who was performing adequately and *then* seeks a replacement." *Id.* at 454.

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establish a *prima facie* case by demonstrating those facts. Thus, the opinion also suggests that its formulation of the standard is one way that a plaintiff may establish a *prima facie* case; it does not foreclose other variations.[4]

The Department suggests that the district court correctly read *Oxman, Crady,* and *Konowitz* as holding that a plaintiff cannot establish a *prima facie* case under the ADEA case if the employer ultimately hires another individual who is also in the protected class. However, this view is contrary to the decisions of an overwhelming majority of other circuits that have expressly recognized that age discrimination may occur under such circumstances.[5] Indeed, it is considered "hornbook law" that the ADEA action can be based on discrimination between older and younger members of the protected class. See *Miller v. Lyng,* 660 F. Supp. 1375, 1377 n.2 (D.D.C. 1987) (compiling

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[3] *continued*

The court ultimately found that if a terminated employee can show that more favorable treatment was given to others who are not in the protected class, "[s]uch a showing is enough to create a reasonable inference [of discrimination]" under *McDonnell Douglas.* Elsewhere in the opinion, *Oxman* refers to more favorable treatment of "a younger person." Thus, *Oxman* does not require that more favorable treatment be given to someone outside the protected class. It suggests that those facts would give rise to the inference but does not stand for the proposition that those are the *only* facts that will suffice to establish a *prima facie* case.

[4] In addition, *Konowitz*'s version of the *prima facie* case cites back to *Young v. Will County Dep't of Public Aid,* 882 F.2d 290, 293 (7th Cir. 1989). *Young* itself cites to *Matthews v. Allis-Chalmers,* 769 F.2d 1215, 1217 (7th Cir. 1985). However, *Matthews* relied upon an entirely different variation of the fourth element, which, coincidentally, was rejected by *Oxman.* Thus, *Matthews* cannot serve as precedent for the *Konowitz-Young* variation on the *prima facie* test.

[5] See, *e.g., Barnes v. Gencorp, Inc.,* 896 F.2d 1457, 1466 (6th Cir. 1990) ("An employer violates ADEA when preference is given to a younger employee even if the younger employee is within the protected class of persons age 40-and-over."); *Carter v. City of Miami,* 870 F.2d 578, 583 (11th Cir. 1989) ("we have declined to hold that a plaintiff's inability to show that he was replaced by someone under forty is an absolute bar to the establishment of a *prima facie* case."); *Bienkowski v. American Airlines,* 851 F.2d 1503, 1506 (5th Cir. 1988) ("A *prima facie* case of age

(Footnote continued on following page)

cases); 3A Larson, *Employment Discrimination* § 98.53, at 21-59 (1990); *cf. Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364, 1372 (2d Cir. 1989) (although court held that plaintiff could not prevail on a *disparate impact* claim where employees who were treated more favorably were also in the protected age group, the court expressly stated that "there is nothing to prevent" the plaintiff from prevailing on a *disparate treatment* claim on the same facts).[6]

Furthermore, a regulation promulgated by the Equal Employment Opportunity Commission (EEOC) expressly states that:

> (a) It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

29 C.F.R. § 1625.2(a). Because the EEOC is the primary

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[5] *continued*
discrimination can be constructed where the plaintiff was replaced by a younger worker even if the younger worker is himself within the protected class."); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir. 1985) ("Courts that have addressed this issue squarely have universally permitted a *prima facie* case to be shown through proof that the favored person was younger than plaintiff. All have held that the replacement need not be younger than 40, the age at which ADEA protection begins."); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 n.13 (4th Cir. 1982) ("an ADEA claim involving replacement by another does not require as a matter of law proof that the other was outside the protected age group.").

[6] We have found one recent Sixth Circuit decision that held that the plaintiff must show that he was replaced by someone outside the protected class. *LaPointe v. United Auto Workers*, 8 F.3d 376, 379 (6th Cir. 1993). However, this decision contains no analysis on the issue; it merely cites to two prior Sixth Circuit decisions that recite this requirement as part of the *prima facie* case. Like *Oxman*, the two prior cases did not squarely address the issue. Significantly, the *LaPointe* decision does not acknowledge the circuit's decision in *Barnes*, which did expressly address the issue and held that an ADEA violation occurs even if the employee who receives more favorable treatment is also within the protected age group. See note 5, *supra*.

agency charged with implementing the ADEA, its interpretation is entitled to great deference. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

Prior to the instant case, this circuit has not squarely addressed the issue. However, three cases have noted the EEOC regulation and acknowledged that "an employer is not insulated from liability for age discrimination when he chooses among people in the protected class." *Mayall v. Peabody Coal Co.*, 7 F.3d 570, 572 (7th Cir. 1993); *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1411 n.4 (7th Cir. 1984); see also *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1228 (7th Cir. 1992) (stating that the court has "no quarrel" with cases that have interpreted the EEOC regulation as providing that "an older plaintiff may maintain a cause of action under the ADEA even if his replacement is over 40.").

Based upon these authorities, we find that the district court erred in holding, as a bright-line test, that the plain tiff could not prove a *prima facie* case because the per son who was ultimately hired for the job was 46 and, therefore, also a member of the protected class. We recognize that there may be some circumstances in which a court may find that the difference in ages between the plaintiff and the favored employee are not sufficient to create a reasonable inference of age discrimination.[7] How ever, in this case, the plaintiff, at age 71, was of an entirely different generation than the employee who was ultimately hired for the position. We, therefore, find that the plaintiff's evidence would satisfy the *prima facie* requirements under the ADEA.

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[7] Although the Fifth Circuit recognized that a plaintiff can construct a prlma facie case even if the favored employee is within the protected class, the court went on to state that "[s]uch a showing is not, however, necessarily sufficient to prove a *prima facie* case." *Bienkowski*, 851 F.2d at 1506. Thus, the Fifth Circuit suggests that a plaintiff should show "that he was replaced by a worker sufficiently younger in the context of his employment ...." *Id.* Similarly, the Third Circuit has

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B. Sufficiency of Evidence to Show Pretext

The district court stated that even assuming the plaintiff could establish a *prima facie* case of discrimination, the Department had met its burden of demonstrating a legitimate, nondiscriminatory reason for its decision not to hire Kralman. Although Kralman had prior experience in this particular position, the Department "indicated that prior experience was not the primary factor in its decision to hire a veterans service office, but that the formal education and temperament of the applicants were the factors considered in hiring." Dist. Ct. Order, at 6.

The court noted that the Department ultimately decided that Brown had a better education and greater enthusiasm for the job than Kralman. In addition, the Department had indicated that it preferred to have a disabled veteran fill the position. Based upon this showing, the district court found that the burden shifted to the plaintiff to show that these reasons were pretextual.

A plaintiff can prove that an employer's proffered reasons for an employment decision are pretextual by one of two methods: (1) by showing that a discriminatory reason more likely than not motivated the employer (i.e., that the company's proffered reasons were not the sole deter mining factors and, therefore, age discrimination might have been a determining factor in addition to the proffered reasons); or (2) that the employer's proffered explanation is unwor-

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[7] *continued*
ed that "[t]he probative value of the replacement as evidence of discrimination will depend on the circumstances of the case. Although replacement by some one younger, without more, will not give rise to an inference of age discrimination, it has been noted that a substantial difference in the ages may be circumstantial evidence that gives rise to that inference." *Maxfield*, 755 F.2d at 792; see also *Loeb v. Textron*, Inc., 600 F.2d 1003, 1013 (lst Cir. 1979) ("the probative value of the evidence as to the age of complainant's replacement obviously will depend on complainant's own age and the age difference. Replacement of a 60 year old by a 35 year old or even a 45 year old within the protected class would be more suggestive of discrimination than replacement of a 45 year old by a 42 year old within the protected class or by a 39 year old outside it.").

thy of credence. *Konowitz,* 965 F.2d at 232. "If the company gives a reason for its decision that is unrelated to age, the plaintiff must present evidence either that the real reason was age or that the stated reason is unworthy of belief—a mere pretext, possibly of discrimination." *Id.* at 232-33.

It is important to keep in mind, however, that there is a fine line between evidence that appropriately challenges the employer's proffered reasons as being unworthy of credence and evidence that merely shows that the employer made a mistake or a bad business judgment.

> [We do "not sit as a super-personnel department that reexamines an entity's business decisions." . . . "No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, [the ADEA does] not interfere." . . . Rather, our inquiry is limited to "whether the employer gave an honest explanation of its behavior."

Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988) (citations omitted). "Thus, the issue of pre text does not address the correctness or desirability of reasons offered for employment decisions. Rather, it ad dresses the issue of whether the employer honestly believes in the reasons it offers." *McCoy v. WGN Continental Broadcasting Co.,* 957 F.2d 368, 373 (7th Cir. 1992); see also *Bienkowski v. American Airlines,* 851 F.2d 1503, 1508 (5th Cir. 1988) ("The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated.").

The appellant argues that there is considerable evidence in the record to challenge the defendant's proffered reasons for hiring Brown over Kralman. The main thrust of this evidence is (1) that the Department supervisors who made the hiring decision are unable to articulate specific facts to support their claims that plaintiff lacked enthusiasm and a professional attitude; (2) Howard Wilson, the supervisor who interviewed the candidates and made the recommendation to hire Brown instead of the plaintiff, was unable to explain how Brown's educational background made him better qualified for the job; and (3) although Wil-

son claims that both candidates were "equally qualified," plaintiff's expert Mike Ippolito contends that Kralman was clearly the superior candidate—apparently because of his prior experience.

Arguably, there may be an issue of fact as to whether the Department truly had a rational basis for its claim that Brown was hired because of his superior education and enthusiasm. However, we need not make that de termination because the plaintiff's evidence clearly is in sufficient to refute the Department's claim that Brown was preferred over Kralman because Brown is a disabled veteran.

Wilson testified in his deposition that he relied on Brown's status as a disabled veteran and claimed that this was a proper criterion. Although there is some dispute among other witnesses as to whether this was in fact a proper criterion,[8] there is nothing in the record to dispute the fact that Wilson himself believed that it was a proper consideration. Therefore, even assuming that Wilson was in correct in thinking that he had to give a preference to Brown because of his status as a disabled veteran, Wilson's decision would fall into the area of an honest mistake or a bad business judgment on Wilson's part; it does not prove that the Department's proffered reason is a pretext.[9]

[8] Plaintiff's expert Ippolito says that the veteran's preference only pertains to the initial examining process by Central Management Services and not in the hiring process by the Department. Joe Steele, a Department supervisor, disagrees with Ippolito's view. However, Department Director John Johnston, who ultimately accepted Wilson's recommendation and approved the hiring of Brown, concedes that it would have been incorrect for the Department to choose Brown over Kralman solely because of Brown's disabled veteran status.

[9] We might reach a different result if the evidence showed that Johnston had made the decision to hire Brown and had based this decision on Brown's disabled veteran status. That decision obviously would be suspect in light of Johnston's statement that it would be improper to grant that type of preference. However, Johnston was not the actual decisionmaker here. To the contrary, the record shows that the hiring decision was made by Wilson and that Johnston merely approved—or in the words of appellant's counsel, "rubber-stamped"—Wilson's recommendation. The appellant has pointed to no evidence in the record that would show that Johnston was aware that Wilson had based his recommendation on Brown's status.

Accordingly, we agree with the district court that the appellant failed to carry his burden of proof on the third step of the *McDonnell Douglas* inquiry.[10]

III. SUMMARY

The district court erred in finding, as a bright-line test, that a plaintiff cannot establish a *prima facie* case of discrimination unless the plaintiff can show that a person out side the protected age group was given more favorable treatment. However, the district court correctly found that the plaintiff could not prove that the Department's reasons for hiring Brown were a pretext for discrimination. Accordingly, the district court's decision is hereby AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[10] We note that in his brief and at oral argument, appellant's counsel makes several references to the fact that the Department had refused to reinstate Kralman to his position and had required him to reapply for the job through the competitive hiring process. Counsel argues that this decision is suspect because the Department could not articulate a specific reason for refusing to recommend that Kralman be reinstated. However, as the appellee points out, the plaintiff's complaint was not based upon a failure to re instate him to the position; rather, his claim was based upon the decision to hire someone else—a younger person—for the position. Even if we were to assume that Johnston had improperly considered Kralman's age in refusing to recommend that he be rein stated, that fact would have no bearing upon our analysis of Wilson's ultimate decision to hire someone else. We have found that Wilson gave a legitimate, nondiscriminatory reason for his choice and that the plaintiff was unable to prove that Wilson's rationale was pretextual. Therefore, plaintiff cannot prevail on his claim that the Department refused to hire him because of his age.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
June 3, 1994

Before
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. James L. Foreman, District Judge*

PAUL H. KRALMAN,
Plaintiff-Appellant,
v. 93-3398
ILLINOIS DEPARTMENT OF VETERANS' AFFAIRS,
Defendant-Appellee.

Appeal from the United States District Court of Illinois, Springfield Division. No. 91-C-3194, Richard Mills, Judge.

ORDER

On consideration of the petition of rehearing filed in the above-entitled cause on May 3, 1994, by plaintiff-appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable James L. Foreman, District Judge for the Southern District of Illinois, sitting by designation.

(2)

FILED
SEP 23 1994
OFFICE OF THE CLERK

Case No. 94-354

In The
Supreme Court of the United States
October Term, 1994

PAUL H. KRALMAN,

PETITIONER,

v.

ILLINOIS DEPARTMENT OF VETERANS' AFFAIRS,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

Roland W. Burris
Attorney General
State of Illinois

By: SCOTT C. HELMHOLZ
(Counsel of Record)
and John A. Kauerauf
Special Assistant Attorneys General
Sorling, Northrup, Hanna,
Cullen and Cochran, Ltd.
607 East Adams, Suite 800
Springfield, IL 62701
(217) 544-1144

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QUESTION PRESENTED FOR REVIEW

Whether a job applicant can defeat an employer's motion for summary judgment in an action for refusal to hire under the Age Discrimination In Employment Act where the applicant has failed to adduce any evidence to contradict the factual basis for the employer's explanation of its refusal to hire applicant?

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JURISDICTION

Defendant accepts Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

This is a "refusal to hire" case under the Age Discrimination in Employment Act, 29 U.S.C. §621, ("ADEA") in which the District Court granted, and the Seventh Circuit affirmed, summary judgment in favor of the employer under Rule 56 Fed.R. Civ.P. The Illinois Department of Veterans' Affairs ("IDVA"), an executive agency of the State of Illinois, employed Plaintiff Paul Kralman as a Veterans' Service Officer ("VSO") in its Vandalia, Illinois office from May, 1979, until the Vandalia office closed in August, 1987, due to lack of funding. Personnel rules at the time gave Mr. Kralman three choices regarding future employment with IDVA: (1) transfer to another VSO office;

(2) accept the layoff and retain an absolute right of recall should the Vandalia office reopen, or (3) retire from employment and accept pension benefits. Mr. Kralman refused a proffered transfer to an identical position at a nearby office, waived his recall rights to the Vandalia position, and elected to retire and draw a pension.

In March, 1989, IDVA made plans to reopen several previously closed offices, including Vandalia. Upon learning of these plans, Mr. Kralman, then age 71, requested that the Director exercise his discretionary power to reinstate Kralman to the Vandalia VSO position. Although Mr. Kralman hoped by this request that IDVA would exercise its discretion in his favor and reinstate him without considering other qualified applicants, IDVA chose instead to interview all

candidates deemed qualified for the position by the Department of Central Management Services ("CMS"), the personnel management agency charged with screening applicants for all State employment.

CMS certified Mr. Kralman and three (3) other applicants for the position, and IDVA interviewed all four. IDVA ultimately hired one of the four candidates, Lynn P. Brown, upon the recommendation of the interviewer, Howard Wilson. Mr. Kralman's description of Mr. Brown's previous experience as "consisting of working at a tavern at the American Legion tending bar" unfairly implies that Mr. Brown had no other previous employment experience. It is undisputed that Mr. Brown, a 46 year old disabled veteran, had three years of college education, had previously held a position as a branch

bank manager, and had successfully pursued veterans' benefits on his own behalf.

Howard Wilson, VSO Supervisor for IDVA's Southern Division, and a 19-year employee, conducted the interviews for the VSO position in November, 1989. Mr. Wilson was 64 years old at the time. At the conclusion of the process, Mr. Wilson recommended Mr. Brown to fill the VSO position and his superiors accepted his recommendation without question or substantive review. In response to deposition questions by Mr. Kralman's counsel, Mr. Wilson advanced three reasons to support his decision to hire Mr. Brown:

(1) Mr. Brown's superior education;

(2) Mr. Brown's demeanor during the interview; and

(3) Mr. Brown's disabled veteran's status.

The record established that Mr. Kralman had very slight post-secondary education and did nothing to prepare for the interview. There is no dispute that Mr. Brown had completed 3 years of college and had a military service-connected disability. Mr. Kralman's assertion that he was rated "exceeds expectations by his supervisors" during his 7 years' tenure as a VSO ignores the uncontradicted testimony of IDVA witnesses that Kralman's supervisor so routinely rated subordinates "exceeds expectations" as to render these evaluations meaningless.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY *CERTIORARI* BECAUSE BOTH LOWER COURTS HAVE APPLIED WELL-SETTLED PRINCIPLES OF LAW TO UNDISPUTED FACTS AND NO COMPELLING REASONS EXIST FOR THIS COURT TO REEXAMINE THOSE PRINCIPLES.

The Seventh Circuit's decision complies with the spirit and the letter of Federal Rule of Civil Procedure Rule 56 as interpreted by prior decisions of this Court. Petitioner does not here nor has he ever established the existence of any genuine material facts or reasonable inferences suggesting that Howard Wilson recommended against hiring Petitioner on account of his age. The Seventh Circuit's decision does not conflict with the decision of another circuit or prior decision of this Court. This Court thus has no call to exercise its power of supervision to review or to disturb the Seventh Circuit's decision. Moreover, this Court has denied *certiorari* in at least one prior Seventh Circuit ADEA case that presented similar issues. Perfetti v. First National Bank of Chicago, 950 F.2d

449 (7th Cir. 1991); cert. den., 112 S.Ct. 2995 (1992).

ARGUMENT IN SUPPORT

The case at bar is precisely the type of case Federal Rule of Civil Procedure Rule 56 is designed to weed out from the overburdened dockets of the federal judiciary. Mr. Kralman, after deposing 15 potential witnesses and engaging in substantial written discovery over several years, presented to the courts below (and now to this Court) nothing more than a series of unsupported allegations, innuendo and conjecture accompanied by a plea to allow him to present his allegations to what he hopes will be a sympathetic jury. Much more is obviously required to defeat a motion for summary judgment.

Mr. Kralman's claim of age discrimination, despite much embellishment

by his counsel, basically derives from a simplistic syllogism: because Kralman had 8 years' experience in the VSO position, the act of selecting any candidate who did not have equal or greater experience constitutes evidence from which a jury could conclude that Howard Wilson's proffered reasons were unworthy of credence and thus pretextual, therefore entitling Kralman to a jury trial on the issue of Wilson's credibility.

The flaw in this logic, and the primary reason for denying *certiorari* in this cause, is that mere contentions cannot take the place of the tangible, countering evidence that this Court and the Seventh Circuit have insisted on in order to defeat summary judgment. This rule of law requires that Mr. Kralman adduce some evidence that Howard Wilson's proferred reasons are unworthy of credence

and thus a pretextual cover-up for an illegal act of age discrimination.

Mr. Wilson's testimony explaining his selection of Mr. Brown must be taken as true and made in good faith for Rule 56 purposes unless Mr. Kralman can adduce evidence from which a reasonable juror could infer Wilson's statements were not made in good faith. It is easy to discuss the type of evidence that would allow such an inference. Testimony that Mr. Wilson knew that Mr. Brown had falsified his educational background; testimony that Mr. Brown was not in fact disabled or a veteran, and that Mr. Wilson knew or had reason to know these matters; testimony that Mr. Wilson had seen memos or been specifically instructed that he was not to consider disabled veteran's status in making hiring recommendations. In the absence of evidence of this nature, there

can be no genuine issue of material fact as to Mr. Wilson's good faith and thus no basis for a reasonable juror to infer he testified in bad faith.

This Court has already offered thorough guidance to its lower courts as to how summary judgment motions should be evaluated. Matsushita Electric Industrial Co., Ltd., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Celotex Corporation v. Catrett, 477 U.S. 317 (1986). The party opposing summary judgment must establish the existence of a genuine material factual dispute. The "mere existence of some alleged factual dispute between the parties will not defeat" a motion for summary judgment. Anderson, 477 U.S. at 247-248. Factual disputes which are irrelevant or unnecessary do not allow a court to deny summary judgment motions,

rather there must be material factual disputes. Anderson, 477 U.S. at 248.

The Seventh Circuit in its analysis of the record below found that Mr. Kralman had presented no facts from which a reasonable jury could conclude that Howard Wilson's proffered reasons for recommending Lynn Brown were bad-faith pretexts advanced to cover up illegal discriminatory intent. The fact that a determination regarding Mr. Wilson's state of mind is called for does not preclude summary judgment. In Anderson, this Court specifically rejected the argument that cases which hinge on interpretations of state of mind are inappropriate for summary judgment resolution. Summary judgment should in fact be granted in such a case unless the non-movant presents "concrete evidence" which a "reasonable" juror could rely upon to find in the non-

movant's favor. Anderson, 477 U.S. 256-257. There is no concrete evidence in the case at bar which a reasonable juror could rely upon to reject Mr. Wilson's stated reasons.

The facts presented by Mr. Kralman in opposition to summary judgment consist of no more than equivocal circumstances, e.g., Mr. Kralman was older than Mr. Brown, Mr. Kralman had prior experience as a VSO, the Vandalia position remained open for a period of time before interviews were conducted, and IDVA officials other than Howard Wilson denied the existence of a hiring preference for disabled veterans. The balance of what Mr. Kralman presents as facts are not facts, but merely inferences and conclusions he labels as facts. Assuming the truth of the above facts, they do not constitute evidence that would create any reasonable inference

that Howard Wilson's testimony concerning his reasons for recommending Lynn Brown was in bad faith or unworthy of credence.

Mr. Kralman asserts variously that Mr. Wilson's decision is "arbitrary," "without basis in fact," and that in his deposition testimony Wilson "could not articulate a factual basis to support his claim" and failed "to advance a factual basis to support his conclusion that Mr. Kralman's demeanor was in any way less desirable or proper" than Mr. Brown's. Having stated his reasons for recommending Mr. Brown for the position, Mr. Wilson had no legal obligation to give persuasively articulate deposition testimony. Whatever lack of articulation Mr. Kralman (or even this Court) finds in Mr. Wilson's testimony cannot supply the "concrete evidence" of contradiction required to create a genuine issue of material fact.

It is not enough for Mr. Kralman to make semantic jabs at Mr. Wilson's deposition testimony to defeat summary judgment; it is incumbent upon him to contradict Wilson's testimony with countering testimony or exhibits.

In the case at bar, Mr. Kralman has never advanced any fact or theory as to why the 64 year old Wilson would want to discriminate against Mr. Kralman on account of his age. This Court has held that the absence of any plausible motive is highly relevant to whether a genuine issue for trial exists. Matsushita Electric Industrial Co., Ltd., 475 U.S. 596-597. Otherwise rational conduct exhibited in the absence of any motive to engage in illegal conduct does not give rise to an inference of illegal activity. Matsushita Electric Industrial Co., Ltd., 475 U.S. at 596-597.

Nor does summary judgment in this case unduly abridge the right to jury trial established by the ADEA, as suggested by Mr. Kralman. In reviewing lower court decisions involving motions for summary judgment, this Court has stated that such motions "must be construed with due regard not only for the rights of persons asserting claims...but also for the rights of persons opposing such claims...to demonstrate...prior to trial, that the claims...have no factual basis." Celotex Corp., 477 U.S. at 327. Summary judgment thus is not a "disfavored procedural shortcut", but is rather an integral part of the Federal Rules allowing the "just, speedy and inexpensive determination of every action." Celotex Corp., 477 U.S. at 327. If Mr. Kralman wants to present a case to a jury, he must first establish facts a jury could

reasonably rely upon to conclude that Mr. Wilson's reasons are unworthy of credence. Since he has not, Defendant's rights guaranteed by Rule 56 must prevail over Kralman's ADEA-based right to a jury trial.

Mr. Kralman's petition fails to articulate any of the traditional reasons this Court has viewed as important in determining whether to grant *certiorari*. No conflict between the circuits is presented. No conflict with any state court is presented. No conflict with any prior decision of this Court is presented. Supreme Court Rule 10. On the contrary, as explained above, the Seventh Circuit's rationale is wholly consistent with this Court's decisions in Matsushita, Anderson and Celotex. Mr. Kralman accordingly has presented no compelling reason for this Court to grant *certiorari*. Mr. Kralman

essentially asks this Court to overturn well-settled principles under ADEA and Rule 56 in order to serve as a super-personnel committee to review a routine hiring decision. As this Court has pertinently observed, "the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies". Bishop v. Wood, 426 U.S. 349 (1976).

CONCLUSION

In concluding that Mr. Kralman has failed to adduce sufficient evidence to create a genuine issue of material fact as to the credence of IDVA's proffered reasons, both the Seventh Circuit and the District Judge have applied well-settled principles of law to undisputed fact.

For the foregoing reasons, Respondent, Illinois Department of Veterans' Affairs, prays this Court deny Petitioner's Petition for *Writ of Certiorari*.

Respectfully submitted,

Roland W. Burris
Attorney General
State of Illinois

By: SCOTT C. HELMHOLZ
(Counsel of Record)
and John A. Kauerauf
Special Assistant Attorneys General
Sorling, Northrup, Hanna,
Cullen and Cochran, Ltd.
607 East Adams, Suite 800
Springfield, IL 62701

Attorneys for the Illinois
Department of Veterans' Affairs.